SENATE JUDICIARY
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Senate Legislative Briefing – HB 204

1. Release and waiver documents are S.O.P. (standard operating procedure) in the commercial recreation world. Specifically -
    - Most underwriters in commercial recreation insurance *require* recreation businesses to include a copy of their release with the insurance application – no release means the business is not a 'good risk' and rates go higher
    - Public land administrators *require* them so that they too can seek release for recreational accidents. In other words – public lands can't sustain judgments (and there are many of them despite sovereign immunity issues) and so as a term of use of publicly permitted lands the land administrator will require the permit holder to name the property (IE – Kootenai National Forest) as one of the parties to be released in the event of an incident...
    - SINCE releases are really SOP everywhere else – we can look to the macrocosm of 'everywhere else' to examine the (somewhat hysterical) voice of the trial lawyers that 'all hell will break' loose if we allow releases to be used. The argument that use of releases will create a huge disincentive toward safety – is not demonstrated in that world of 'everywhere else' so the trial lawyer's prediction of doom and gloom (an unsafe recreation industry if releases are allowed) is NOT accurate. Please see map of U.S. for indication of the states throughout the country that are allowing use of releases.
2. Need to move past the idea that releases do one horrible thing (allowing operators to run amuck and operate unsafely...) – releases are really just a contract/agreement that is done between the operator and the client/participant in advance of the activity. The agreement sets a NUMBER of different terms/ground rules to the relationship the operator and the client will have as a result of embarking on the recreation activity together (remember that recreational activities are ***voluntary*** in nature – no one has to do these activities – they ***choose*** to go along...). In addition to discussing inherent risks and simple negligence, releases actually take care of the additional terms of the relationship/transaction:
    - The parties agree that the operator should seek advanced medical care for the client in the event of a severe/critical injury. The parties agree to waive HIPPA style constraints so the operator can turn over whatever information it has to advance medical care if the client is transferred over to medical personnel or extricated from the field.
    - The release may allow clients and the operator to use photos that might be taken on the trip – this protects BOTH parties in these days of social media and online presence.

- The release should establish jurisdiction in the Montana courts so that clients can't come into the state, avail themselves of local businesses and recreational opportunities and then drag those businesses/Montanans into other jurisdictions where they would have to try to defend themselves. The agreements also establish that out of state citizens who want to sue one of our businesses will have to submit to the jurisdiction of the Montana courts. (Jurisdiction selection and forum submission clauses).
- Releases express (in writing and in advance of the activity) and detail the possible damages (injury, death, property loss) the client could experience if they encounter one of the many risks (IE - falling, swimming, animal behaviors, encountering wildlife, protracted rescue scenarios, participants' improper use of equipment, etc.) of the activity they want to participate in.... Plainly speaking – the release is another way of ensuring proper warnings are given.
- The release enunciate that the parties agree and accept the electronic formats for documentation and signatures that are popular and useful for BOTH operator and client/participant these days (made legal by the Federal Electronic Signatures Act).
- If the client/participant declines use of normal safety equipment (IE – helmets for horseback riding) that warning of increased risk by the operator and declination by the client will be recorded.

3. In the real world the idea that a release and waiver agreement 'absolves' operators from having to be safe or gives them a disincentive or lack of incentive toward safety doesn't actually play out. In reality:
    - In only somewhere around ¼ of the cases (give or take) are the releases ***dispositive*** of the claim/case. In other words – they are not the be-all and end-all the trial lawyers would have you believe. Releases are a tool – not an automatic result. The release simply records what the parties had agreed to before the activity occurred. If the client participant then does not want to be bound by the release or tries to avoid the terms of the release they will ask that the court decline to uphold the release or they will ask the court to scrutinize the release.
        - In point of fact, courts routinely review (scrutinize) releases for clarity, independence from other documents, etc. as a normal part of the litigation process.
        - Most cases are resolved by settlement before a trial occurs and some before complaints are even filed. It is often less onerous/expensive for BOTH parties to resolve the conflict that may exist short of the entire litigation process.
        - The constellation of OTHER realties of delivering/producing recreational products in this day and age means that safety remains SOP (regardless of

whether a release is at play) in the industry. IE –

- Public land administrators have the power to revoke an operator's permit to operate on public lands if the land administrator thinks that the operator is unsafe or as a result of a serious incident. This could – in effect – shut down a business.
- In the court of public opinion (IE - YELP, Trip Advisor, other online and immediately available media, blogs, postings, etc.) an operator cannot be seen to be unsafe, produce a poor quality product, etc. without losing market share to the point of complete business loss.
- Insurance markets will not continue to underwrite a recreational operator with severe or frequent losses.

4. The reality of the bill is that it is pro-business. With recreation so critically important to Montana's economy – the Legislature and the Administration should protect the industry.
5. The bill is also a protection for the actual client/participant who wants to partake of a recreational activity/opportunity for a number of reasons.
    - It gives specific written warnings of the types of damages that can happen from the various risks a person might encounter on the activity and it does that in advance of the activity.
    - As described above - and like other contracts/agreements – it sets agreements/terms of the relationship the client-participant and the operator will have with one another. IE – in exchange for the operator taking the risk of acquiring gear and personnel and then taking the client out on the activity – the client participant agrees to pay money and to follow the safety policies/procedures of the operator. And... the parties agree in advance that certain types of damages are foreseeable as a result of the risks that exist in the activity and they agree that if there is to be legal action it has to occur in MT and they agree that the operator can seek medical care...etc., etc.
    - Probably most importantly it cancels a clients' liability as much as it cancels the operators' liability. In truth, legal liability or responsibility is a two way street and that occurs as a result of the legal mechanism of comparative/contributory fault. In each case there can ever only be 100% fault – but that fault can be split between the client and the operator (IE – the hiking client may get hurt out in the woods and try to blame the operator – but in reality the client didn't listen to the guide's instructions and wandered off in the wrong direction so both parties could be found to bear liability/responsibility for the injury). If the release/waiver the parties struck before the activity stated that the client agreed not to sue in the event of an incident (that is NOT gross negligent) then the client cannot be charged with comparative fault either. Where there is no legal exposure to the operator for general mishaps there is then no exposure to the

client either – the release settles (or attempts to settle) that aspect of the relationship.

- Releases drive home the seriousness of the activity and of the relationship between client/operator. Clients take these documents seriously and they generally have a more healthy respect foe the activity after they read about the risks and possible damages that can occur. As a result clients are more educated and more sober (less reckless) in their own behaviors so clients are more proactively safe.

6. The real issue with pre-activity recreational release and waiver documents is a 'freedom to contract' issue. In practical reality we allow people – private citizens - in our society the freedom to enter into all kinds of contracts for experiences and things they want to do or obtain (IE - mortgages, educational opportunities, loans for all manner of consumer items, medical services, child care services, employment opportunities, etc.). Why on earth the Montana Legislature or the Administration would want to abrogate a private citizens' right to enter into a private agreement with someone else to participate in a voluntary recreational activity is hard to understand.
7. The overall importance of the recreation industry cannot be underestimated – this industry deserves protection.
    - The industry is second really only to agriculture in Montana – and when agricultural subsidies are stripped away, recreation may be the larger of the two industries.
    - Equally as important – what we know from the various segments of the industry that produce severe results (IE – deadly incidents) is a critically lower fatality rate per number of recreational user days exists in the commercial or guided context; put another way, the per capita death rate among private recreationalists is significantly higher than it is in the commercial guided context. Studies suggest that somewhere between two thirds and three quarters of the time deadly recreation accidents occur, they occur in unguided noncommercial settings.

Very plainly put – commercial recreation operators offer individuals opportunities to recreate AND to get out onto public lands in a statistically safer situation that the individual could likely create him/herself. For the operator to incur all the risks (operating capital, training, permits, insurance, etc.) AND create a safer option for individual recreation enthusiasts and then to be thrown under the bus by the Legislature and/or the Administration is wrong. The Legislature and the Administration should not be just 'pro-business' they should be 'pro-safety' too – and that safety comes from commercial recreation providers far more often than not.